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CONSTITUTIONAL LAW-EQUAL PROTECTION-FOREIGN CORPORATIONS-DISCRIMINATORY INTANGIBLES TAX

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CONSTITUTIONAL LAW—EQUAL PROTECTION—FOREIGN CORPORATIONS—DISCRIMINATORY INTANGIBLES TAX—An Ohio statute¹ required foreign corporations doing business within the state to pay an ad valorem tax on accounts receivable which arose through outstate sales of goods shipped from warehouses within the state, even though the sales were consummated by an agent maintaining his office without the state. Such intangibles were declared by the Ohio statutory formula to have a situs within the state. At the same time, the accounts receivable of Ohio residents and domestic corporations which were derived from outstate sales by agents having their offices without the state were exempt, even though the goods were shipped from stockpiles within the state. Such intangibles were declared to have a situs without the state and purportedly left subject to the taxing power of other states by a provision for "reciprocity" in the statute. The appellants, two foreign corporations doing business in Ohio, objected to assessment of certain intangibles by the state tax commissioner pursuant to the statute. Their contention that the statute was violative of the Federal Constitution was rejected and the assessment affirmed by the Board of Tax Appeals and the Ohio Supreme Court.² On appeal to the Supreme Court of the United States, *held*, reversed. The action of a state in subjecting the intangibles of a foreign corporation to taxation while exempting those of domestic corporations amounts

¹ Ohio Gen. Code (Throckmorton, 1948) §§5328-1, 5328-2.

"Property ... arising out of business transacted in this state by ... a *non-resident* ... shall be subject to taxation; and all such property of [*residents*] ... arising out of business transacted outside of this state ... shall not be subject to taxation.

"Property ... shall be considered to arise out of business transacted in a state *other* than that of [*residence*] ... under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such *other* state or from a stock of goods maintained therein ..." (*Italics supplied*).

² *National Distillers Products Corp. v. Glander*, 150 Ohio St. 229, 80 N.E. (2d) 863 (1948). See 17 UNIV. CIN. L. REV. 382 (1948).

to a denial of equal protection of the laws. Two justices dissented.³ *Wheeling Steel Corporation v. Glander*, (U.S. 1949) 69 S.Ct. 1291.

The instant case reaffirms a settled rule that foreign corporations, once within the jurisdiction of a state and authorized to do business, are entitled to the safeguards of the equal protection clause and may not be unduly burdened with discriminatory taxation.⁴ It is clear that a state may refuse to admit a corporation seeking to do intrastate business, or may attach to admission such conditions as are not unconstitutional.⁵ So long as a corporation is without the jurisdiction of a state it has no standing to complain of state action which is discriminatory.⁶ At one time even foreign corporations within a state were considered incompetent to invoke the protection of the Fourteenth Amendment.⁷ However, in 1910, the Supreme Court recognized that a foreign corporation could successfully attack discriminatory tax legislation passed after its admission to do business in the state.⁸ Subsequently, the principle was limited to those foreign corporations holding within the state large amounts of property of a fixed and permanent nature.⁹ However, the limitation was finally removed in 1926 by the decision of *Hanover Fire Insurance Co. v. Harding*.¹⁰ While the challenge to the foregoing authority was not serious in the principal case, the respondent taxing commissioner strongly urged that the Ohio statute did not deny equal protection of the law to foreign corporations since it contained a provision for "reciprocity" which operated to

³ Justice Douglas dissented from the fundamental proposition that a corporation is a "person" within the meaning of the Fourteenth Amendment and therefore entitled to invoke its protection. Justice Black, of course, concurred in dissent since the views expressed are in accord with his dissent in *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 58 S.Ct. 436 (1937). See Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 *YALE L. J.* 371 (1938); Boudin, "Truth and Fiction about the Fourteenth Amendment," 16 *N. Y. UNIV. L. Q.* 19 (1938).

⁴ *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 54 S.Ct. 830 (1934); *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 S.Ct. 678 (1927); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 47 S.Ct. 179 (1926).

⁵ *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 30 S.Ct. 190 (1909). See Hale, "Unconstitutional Conditions and Constitutional Rights," 35 *COL. L. REV.* 321 (1935); Merrill, "Unconstitutional Conditions," 77 *UNIV. PA. L. REV.* 879 (1929).

⁶ An important difference between the due process and equal protection clauses is that the former applies to all persons whatsoever, the latter only to such persons as are "within the jurisdiction" of the state whose action is challenged. See Sholley, "Corporate Taxpayers and the Equal Protection Clause," 31 *ILL. L. REV.* 463 (1936).

⁷ Foreign corporations were not considered "persons" within the meaning of the Fourteenth Amendment. *Philadelphia Fire Assn. v. New York*, 119 U.S. 110, 7 S.Ct. 108 (1886); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 24 L.Ed. 148 (1874).

⁸ *Southern Railway Co. v. Greene*, 216 U.S. 400, 30 S.Ct. 287 (1910).

⁹ *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U.S. 132, 38 S.Ct. 444 (1918); *Cheney Bros. Co. v. Mass.*, 246 U.S. 147, 38 S.Ct. 295 (1918); *Baltic Mining Co. v. Mass.*, 231 U.S. 68, 34 S.Ct. 15 (1913).

¹⁰ 272 U.S. 494, 47 S.Ct. 179 (1926). Noted 40 *HARV. L. REV.* 777 (1927), 15 *CALIF. L. REV.* 316 (1927).

re-establish equality.¹¹ The argument was advanced that although intangibles of domestic corporations, derived from the sources described, were exempt, the statute fixed the situs of such intangibles without the jurisdiction of the state, leaving them subject to the taxing power of other states. Since neighboring states are free to impose similar taxing schemes, respondent contended, the provision operated "reciprocally" to afford equal treatment.¹² Even conceding the dubious premise that Ohio has the power to manipulate the situs of intangibles with such freedom, the conclusion that equality is re-established by an offer of "reciprocity" looms as a non-sequitur in the respondent's argument.¹³ Justice Jackson, writing for the Court, said, "It is hard to see that this offer . . . restores to appellants any of the equality which the . . . Ohio tax, considered alone, so obviously denies."¹⁴ A formidable contention of the appellant-taxpayers in the principal case, which was rejected by the courts below, was to the effect that the intangibles which Ohio sought to tax had no situs in Ohio and were therefore immune to its taxing power. While Justice Jackson took cognizance of the argument, he conveniently seized upon the equal protection clause as a basis for the decision and thus was able to avert the more delicate and complex question of due process.¹⁵

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¹¹ The statute provides: "The provisions of this section shall be *reciprocally* applied, to the end that all property of the kinds and classes mentioned . . . having a business situs in this state shall be taxed herein and no property . . . belonging to a person residing in this state . . . shall be taxed." (Italics supplied). Ohio Gen. Code (Throckmorton, 1948) §5328-2.

¹² See Faught, "Reciprocity in State Taxation as the Next Step in Empirical Legislation," 92 *UNIV. PA. L. REV.* 258 (1944).

¹³ Ohio's statute was undoubtedly framed with an eye on the problems of double taxation of intangibles. See Brown, "The Present Status of Multiple Taxation of Intangible Property," 40 *MICH. L. REV.* 806 (1942); Brown, "Multiple Taxation by the States—What Is Left of It?" 48 *HARV. L. REV.* 407 (1935).

¹⁴ Principal case at 1297.

¹⁵ For a discussion of state power under the due process clause to tax intangibles, see Howard, "State Jurisdiction to Tax Intangibles: A Twelve Year Cycle," 8 *MO. L. REV.* 155 (1943); Stinson, "Due Process of State Taxation," 29 *GEO. L. J.* 271 (1940); Bowman, "The State's Power over Foreign Corporations," 9 *MICH. L. REV.* 549 (1911).